



**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

**[EPA-R09-OAR-2011-0876; FRL-9617-9]**

**Revisions to the California State Implementation Plan, South  
Coast Air Quality Management District**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** In this action, we are proposing to approve South Coast Air Quality Management District (SCAQMD) Rule 317, "Clean Air Act Non-Attainment Fee," as a revision to SCAQMD's portion of the California State Implementation Plan (SIP). Rule 317 is a local rule submitted to address section 185 of the Clean Air Act (CAA or Act). We are proposing that Rule 317, an equivalent alternative program, is not less stringent than the program required by section 185, and, therefore, is approvable, consistent with the principles of section 172(e) of the Act. As part of this action, we are inviting public comment on whether it is appropriate for EPA to consider equivalent alternative programs, and, if so, whether Rule 317 would constitute an approvable equivalent alternative program. We are taking comments on these proposals and plan to follow with a final action.

**DATE:** Any comments must arrive by [Insert date 30 days from the

date of publication in the Federal Register].

**ADDRESSES:** Submit comments, identified by docket number EPA-R09-OAR-2011-0876, by one of the following methods:

1. Federal eRulemaking Portal: [www.regulations.gov](http://www.regulations.gov). Follow the on-line instructions.
2. E-mail: [steckel.andrew@epa.gov](mailto:steckel.andrew@epa.gov).
3. Mail or deliver: Andrew Steckel (Air-4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105-3901.

*Instructions:* All comments will be included in the public docket without change and may be made available online at

[www.regulations.gov](http://www.regulations.gov), including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through [www.regulations.gov](http://www.regulations.gov) or e-mail.

[www.regulations.gov](http://www.regulations.gov) is an "anonymous access" system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to

consider your comment.

*Docket:* Generally, documents in the docket for this action are available electronically at [www.regulations.gov](http://www.regulations.gov) and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed at [www.regulations.gov](http://www.regulations.gov), some information may be publicly available only at the hard copy location (e.g., copyrighted material, large maps), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

**FOR FURTHER INFORMATION CONTACT:** Lily Wong, EPA Region IX, (415) 947-4114, [wong.lily@epa.gov](mailto:wong.lily@epa.gov).

**SUPPLEMENTARY INFORMATION:** Throughout this document, "we," "us" and "our" refer to EPA.

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### **I. What Did the State Submit?**

On February 4, 2011, SCAQMD adopted Rule 317, "Clean Air Act Non-attainment Fee," to meet the requirements of CAA section 185. On April 22, 2011, the California Air Resources Board (CARB) submitted SCAQMD's Rule 317 to EPA. On May 19, 2011, EPA determined that the submittal met the completeness criteria in 40 CFR Part 51 Appendix V, which must be met before formal EPA review. SCAQMD provided supplemental information in a letter dated December 21, 2011.

### **II. Are There Other Versions of This Rule?**

There are no previous versions of Rule 317 in the SIP. Although the SCAQMD adopted an earlier version of Rule 317 on December 5, 2008, that rule was never submitted to EPA for approval as a SIP revision.

### **III. What Action is EPA Taking?**

EPA is proposing to approve Rule 317 as a revision to SCAQMD's portion of the California SIP. The purpose of Rule 317 is to satisfy the requirements of sections 182 and 185 of the Act by utilizing an equivalency approach consistent with the principles of section 172(e) of the Act. Under Rule 317, SCAQMD will track, calculate, analyze, and report to demonstrate that

the requirements of section 185 of the Act have been met. Rule 317 includes: calculation of CAA non-attainment (section 185) fee obligation, establishment of a "section 172(e) fee equivalency account," an annual demonstration of equivalency, an annual preliminary determination of equivalency, reporting to CARB and EPA, and a backstop provision for failure to achieve equivalency. The "section 172(e) fee equivalency account" will include funds from qualified programs that are surplus to the 1-hour ozone SIP and designed to result in direct reductions or facilitate future reductions of VOC or NO<sub>x</sub> emissions.

In this action, EPA is also proposing to approve Rule 317 as an alternative to the program required by section 185 of the Act. We are proposing that SCAQMD's equivalent alternative program is not less stringent than the program required by section 185, and, therefore, is approvable, consistent with the principles of section 172(e) of the Act as explained more fully below. We are taking comments on these proposals and plan to follow with a final action.

#### **IV. Background**

##### **Section 185 Fees**

Under sections 182(d)(3), (e), (f) and 185 of the Act, states with ozone nonattainment areas classified as Severe or Extreme are required to submit a revision to the SIP that would

require major stationary sources of VOC or NO<sub>x</sub> to pay a fee for each ton of VOC or NO<sub>x</sub> emitted in excess of 80% of baseline emissions.<sup>1</sup> Under section 185(a) of the Act, the SIP revision must provide that the fees be paid if the area to which the SIP revision applies has failed to attain the 1-hour ozone National Ambient Air Quality Standard (NAAQS or standard) by the applicable attainment date. A source's baseline emissions are its actual emissions during the required attainment year. The fee rate is \$5,000 per ton in 1990 dollars, which must be adjusted for inflation based on the Consumer Price Index (CPI).

South Coast Air Quality Management District

There are two 1-hour ozone nonattainment areas within the jurisdiction of the SCAQMD: the Los Angeles-South Coast Air Basin Area (South Coast Air Basin) and the Coachella Valley region of Riverside County in the Southeast Desert Modified Air Quality Maintenance Area (Riverside County portion of Southeast Desert Modified AQMA).<sup>2</sup> The South Coast Air Basin is an Extreme nonattainment area for the 1-hour ozone standard; the attainment year is 2010. The Riverside County portion of the Southeast Desert Modified AQMA is a Severe-17 nonattainment area for the

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<sup>1</sup> VOC help produce ground-level ozone and smog, which harm human health and the environment. NO<sub>x</sub> helps produce ground-level ozone, smog and particulate matter, which harm human health and the environment.

<sup>2</sup> "Riverside County portion of Southeast Desert Modified AQMA" is the same geographic area as "Riverside County portion of the Salton Sea Air Basin" and Rule 317 uses the latter terminology.

1-hour ozone standard; the attainment year is 2007. Therefore, California was required under sections 182(d)(3), (e) and (f) to develop and submit a SIP revision meeting the requirements of section 185, which are discussed above.

On December 30, 2011, we published a finding that the South Coast Air Basin and the Southeast Desert Modified AQMA failed to attain the 1-hour ozone standard by their applicable attainment dates (76 FR 82133).

Pursuant to California law, the SCAQMD is responsible for developing rules, such as Rule 317, that are intended to meet CAA SIP requirements for the two nonattainment areas described above under SCAQMD jurisdiction. Such rules are then submitted to EPA after adoption by CARB, which is the State agency responsible for SIP matters on behalf of the State of California. On April 22, 2011, CARB submitted Rule 317 to satisfy SCAQMD's obligations under sections 182 and 185 of the Act.

#### **V. What is the Legal Rationale for Equivalent Alternative Programs?**

EPA is proposing that states can meet the section 185 obligation arising from the revoked 1-hour ozone NAAQS through a SIP revision containing either the fee program prescribed in section 185 of the Act, or an equivalent alternative program. As

further explained below, EPA is proposing that an alternative program may be acceptable if EPA determines, through notice-and-comment rulemaking, that it is consistent with the principles of section 172(e) of the CAA and is not less stringent than a program prescribed by section 185.<sup>3</sup>

Section 172(e) is an anti-backsliding provision of the CAA that requires EPA to develop regulations to ensure that controls in a nonattainment area are "not less stringent" than those that applied to the area before EPA revised a NAAQS to make it less stringent. In the Phase 1 Ozone Implementation Rule for the 1997 ozone NAAQS published on April 30, 2004 (69 FR 23951), EPA determined that although section 172(e) does not directly apply where EPA has strengthened the NAAQS, as it did in 1997, it was reasonable to apply to the transition from the 1-hour NAAQS to the more stringent 1997 8-hour NAAQS, the same anti-backsliding

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<sup>3</sup> EPA has previously set forth this reasoning in a memorandum from Stephen D. Page, Director, Office of Air Quality Planning and Standards, to Air Division Directors, "Guidance on Developing Fee Programs Required by Clean Air Act Section 185 for the 1-hour Ozone NAAQS," January 5, 2010 ("Section 185 Guidance Memo"). On July 1, 2011, the D.C. Circuit Court of Appeals vacated this guidance, on the ground that it was final agency action for which notice-and-comment rulemaking procedures were required. *NRDC v. EPA*, No. 10-1056, 2011 WL 2601560, C.A.D.C. 2011. EPA subsequently set forth this reasoning in a rulemaking action concerning an equivalent alternative 185 program submitted as a SIP revision to EPA by the State of California on behalf of the San Joaquin Valley Unified Air Pollution Control District ("SJVUAPCD"). 76 FR 45213 (July 28, 2011). In so doing, we were applying the court's directive to follow the rulemaking requirements set forth in the Administrative Procedures Act to inform consideration of section 185 and equivalent alternative programs. In this action regarding SCAQMD Rule 317, we are again applying the court's directive to follow rulemaking requirements with respect to section 185 and equivalent alternative programs.



principle that would apply to the relaxation of a standard. Thus, as part of applying the principles in section 172(e) for purposes of the transition from the 1-hour standard to the 1997 8-hour standard, EPA can either require states to retain programs that applied for purposes of the 1-hour standard, or can allow states to adopt equivalent alternative programs, but only if such alternatives are determined through notice-and-comment rulemaking to be "not less stringent" than the mandated program. EPA has previously identified three types of alternative programs that could satisfy the section 185 requirement: (i) those that achieve the same emissions reductions; (ii) those that raise the same amount of revenue and establish a process where the funds would be used to pay for emission reductions that will further improve ozone air quality; and (iii) those that would be equivalent through a combination of both emission reductions and revenues.<sup>4</sup>

We are proposing today to determine through notice-and-comment rulemaking that states can demonstrate an alternative program's equivalency by comparing expected fees and/or emissions reductions directly attributable to application of section 185 to the expected fees, pollution control project

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<sup>4</sup> These types of programs were identified in our rulemaking action concerning SJVUAPCD's alternative section 185 fee program 76 FR 45213 (July 28, 2011).

funding, and/or emissions reductions from the proposed alternative program. Under an alternative program, states might opt to shift the fee burden from a specific set of major stationary sources to non-major sources, such as owners of mobile sources that also contribute to ozone formation. EPA also believes that alternative programs, if approved as "not less stringent" than the section 185 fee program, would encourage one-hour ozone NAAQS nonattainment areas to reach attainment as effectively and expeditiously as a section 185 fee program, if not more so, and therefore satisfy the CAA's goal of attainment and maintenance of the NAAQS.

While section 185 focuses most directly on assessing emissions fees, we believe it is useful to interpret anti-backsliding requirements for section 185 within the context of the CAA's ozone implementation provisions of subpart 2 (which includes section 185). The subpart 2 provisions are designed to promote reductions of ozone-forming pollutant emissions to levels that achieve attainment of the ozone NAAQS. In this context, to satisfy the anti-backsliding requirements for section 185 associated with the 1-hour NAAQS we believe it is appropriate for states to implement equivalent alternative programs that maintain a focus on achieving further emission reductions, whether that occurs through the incentives created

by fees levied on pollution sources or other funding of pollution control projects, or some combination of both. For any alternative program adopted by a state, the state's demonstration that the program is not less stringent should consist of comparing expected fees and/or emission reductions directly attributable to application of section 185 to the expected fees, pollution control project funding, and/or emissions reductions from the proposed alternative program. For a valid demonstration to ensure equivalency, the state's submissions should not underestimate the expected fees and/or emission reductions from the section 185 fee program, nor overestimate the expected fees, pollution control project funding, and/or emission reductions associated with the proposed alternative program.

We also note that the structure established in Subparts 1 and 2 of the CAA recognizes that successful achievement of clean air goals depends in great part on the development by states of clean air plans that are specifically tailored to the nature of the air pollution sources in each state. The Act recognizes that states are best suited to design plans that will be most effective. Allowing states to put forward an equivalent program under the circumstances that pertain here, and under the

authority of 172(e), is consistent with this principle of the Act.

In sum, in order for EPA to approve an alternative program as satisfying the 1-hour ozone section 185 fee program SIP revision requirement, the state must demonstrate that the alternative program is not less stringent than the otherwise applicable section 185 fee program by collecting fees from owner/operators of pollution sources, providing funding for emissions reduction projects, and/or providing direct emissions reductions equal to or exceeding the expected results of the otherwise applicable section 185 fee program. We are inviting public comment on whether it is appropriate for EPA to consider equivalent alternative programs, and, if so, whether Rule 317 would constitute an approvable equivalent alternative program.

## **VI. What is EPA's Analysis of SCAQMD's Alternative Program?**

### Summary of SCAQMD's Alternative Program

In today's action, we are proposing to approve SCAQMD Rule 317 as an equivalent alternative program that satisfies the section 185 requirement under the principles of section 172(e). Further information regarding Rule 317 is set forth below and in EPA's Technical Support Document (TSD) for this action.

The purpose of Rule 317 is to satisfy the requirements of section 185 of the Act by utilizing an equivalency approach

consistent with the principles of 172(e) of the Act. Under Rule 317, SCAQMD will track, calculate, analyze, and report to demonstrate that the requirements of section 185 of the Act have been met. Rule 317 includes: calculation of CAA non-attainment (section 185) fee obligation; establishment of a "section 172(e) fee equivalency account" to track qualified expenditures on pollution control projects; an annual demonstration of equivalency; an annual preliminary determination of equivalency; reporting to CARB and EPA; and a backstop provision for failure to achieve equivalency.

As described above, there are two 1-hour ozone nonattainment areas within the jurisdiction of the SCAQMD. By letter dated December 21, 2011, SCAQMD clarified that they intend to provide separate equivalency demonstrations for the two non-attainment areas in that the equivalency analyses will compare fee obligations within each non-attainment area to expenditures within the same non-attainment area.

SCAQMD will establish a "section 172(e) fee equivalency account" that will be credited with expenditures from qualified programs that meet the criteria in section (c)(1)(A) of Rule 317: (i) surplus to the 1-hour ozone SIP and approved by the District, CARB, and EPA as being surplus to the SIP; (ii) designed to result in direct VOC or NO<sub>x</sub> reductions in SCAQMD, or

to facilitate future VOC or NO<sub>x</sub> reductions in SCAQMD through vehicle/engine fueling infrastructure or advanced technology development efforts for implementation within the next 10 years, or for other uses approved by EPA; (iii) expenditures occurring only in calendar years subsequent to 2008 from eligible projects;<sup>5</sup> and (iv) only monies actually expended from qualified programs during a calendar year shall be credited. Rule 317 provides that the equivalency account may be pre-funded with expenditures from the programs listed in Attachment A of the rule.<sup>6</sup>

SCAQMD will annually calculate the total amount of major stationary source fees that would have been assessed in the prior calendar year under a direct implementation of section 185 of the Act. A fee is calculated for each major stationary source whose actual emissions of VOC or NO<sub>x</sub> exceed 80% of its baseline emissions. The fee rate is \$5,000 per ton in 1990 dollars, which must be adjusted for inflation based on the Consumer Price Index (CPI).

While CAA section 185 requires baseline emissions to be

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<sup>5</sup> By letter dated December 21, 2011, SCAQMD clarified that for the South Coast Air Basin equivalency demonstration, SCAQMD intends only to include expenditures that occurred in calendar years 2010 and forward.

<sup>6</sup> Attachment A of Rule 317 identifies potential sources of funds for the section 172(e) fee equivalency account. These potential funding mechanisms include: fees from motor vehicles pursuant to AB 118 and AB 27866 and federal grants to fund retrofitting of school buses and trucks.

based on the lower of the source's actual or allowable<sup>7</sup> emissions during the attainment year, it also allows the use of an alternative period as provided in EPA guidance. Rule 317 specifies that baseline emissions of an existing source in the South Coast Air Basin will be based on an average of the source's actual emissions during fiscal years 2005-06 and 2006-07 (which are not to exceed allowable emissions), and would be programmatically adjusted by SCAQMD to take into account the effects of new requirements or regulations from 2006 to 2010. In the Salton Sea Air Basin, an existing source's baseline emissions are its reported emissions during 2007, the attainment year for the Southeast Desert Modified AQMA. Rule 317 also specifies that, for sources that become subject to the rule after the attainment year, baseline emissions are based on allowable limits in the applicable implementation plan or potential to emit, or holdings of RECLAIM Trading Credits.

SCAQMD will annually demonstrate that the funds in the section 172(e) fee equivalency account for the prior year are equal to or greater than the CAA non-attainment (section 185) fee obligation that would have been assessed for the prior year.

SCAQMD will also annually project whether adequate funding

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<sup>7</sup> "Allowable" emissions are the amount of emissions that are allowed under the source's permit, or if no such permit has been issued to the source for the attainment year, the amount of emissions allowed under the applicable attainment plan (CAA section 185(b)(2)).

is expected to be available in the section 172(e) fee equivalency account in the current year in accordance with the equation in section (c)(4) of the rule. This preliminary determination of equivalency requires the projection to show that the amount of funds in the fee equivalency account are at least 110% of the previous year's fee obligation, which serves as a surrogate for the current year's fee obligation.

SCAQMD will annually report to CARB and EPA on the results of the demonstration of equivalency and preliminary determination of equivalency, as well as information on facilities' fee obligations, programs and expenditures included in the fee equivalency account, and any surplus funding carried over to the subsequent calendar year.

If the annual demonstration of equivalency fails to show sufficient funds in the section 172(e) fee equivalency account for the prior year, or the preliminary determination of equivalency shows that adequate funding may not be available in the current year, then Rule 317 requires the SCAQMD Executive Officer (EO) to submit to the Governing Board within 90 days of the finding a back-stop rule that would require the EO to collect and/or track adequate fees for any shortfall. The Governing Board is required to act on the backstop rule within 120 days of the funding inadequacy finding.



If SCAQMD adopts a backstop rule applicable to major stationary sources, Rule 317 states that the backstop rule would include provisions that allow sources to request an alternate baseline period and multi-site aggregation of baseline and emissions. Rule 317 also states that stationary sources paying such fees in the backstop rule shall receive a credit for annual operating fees and annual operating emission fees paid to SCAQMD.

EPA's TSD has more information about SCAQMD's equivalent alternative program.

#### How is EPA Evaluating SCAQMD's Alternative Program?

Generally, SIP rules must be enforceable (see section 110(a) of the Act). Guidance and policy documents that we use to evaluate enforceability requirements consistently include the following:

1. "Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations," EPA, May 25, 1988 (the Bluebook).
2. "Guidance Document for Correcting Common VOC & Other Rule Deficiencies," EPA Region 9, August 21, 2001 (the Little Bluebook).
3. "State Implementation Plans; Nitrogen Oxides Supplement to the General Preamble; Clean Air Act Amendments of 1990 Implementation of Title I; Proposed Rule," (the NO<sub>x</sub>

Supplement), 57 FR 55620, November 25, 1992.

4. "Review of State Implementation Plans and Revisions for Enforceability and Legal Sufficiency; Section 110: State Implementation Plans," EPA, September 23, 1987 Memorandum.

Also, SIP revisions must not interfere with any applicable requirement concerning attainment and reasonable further progress (RFP) or any other applicable requirement of the Act (CAA section 110(1)).

SCAQMD's equivalent alternative program must also be evaluated against section 185 of the Act, as described above under section III of this document. EPA also developed the following guidance on establishing baselines as allowed by section 185:

5. Memorandum from William Harnett, Director of the Air Quality Policy Division to the Regional Air Division Directors, entitled, "Guidance on Establishing Emissions Baselines under Section 185 of the Clean Air Act (CAA) for Severe and Extreme Ozone Nonattainment Areas that Fail to Attain the 1-hour Ozone NAAQS by their Attainment Date," March 21, 2008.<sup>8</sup>

Does SCAQMD's Alternative Program Meet the Evaluation Criteria?

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<sup>8</sup> This guidance can be found at:  
[http://www.epa.gov/ttn/oarpg/t1/memoranda/20080321\\_harnett\\_emissions\\_baseline.pdf](http://www.epa.gov/ttn/oarpg/t1/memoranda/20080321_harnett_emissions_baseline.pdf).

As described below, we are proposing to find that SCAQMD's equivalent alternative program is consistent with the relevant policy and guidance regarding enforceability, SIP revisions, and sections 172(e) and 185 of the Act.

One initial step in the equivalency demonstration is to determine the benchmark for comparison, i.e., the amount of fees that would have been collected under direct implementation of section 185. A fee is calculated for each major stationary source whose actual emissions of VOC or NO<sub>x</sub> exceed 80% of its baseline emissions. Rule 317 reflects the method for calculation of the fee set out in section 185(b)(1) of the Act.

Section 185 specifies that baseline emissions are the lower of a source's actual or allowable emissions during the attainment year. Section 185 and EPA's March 21, 2008 baseline guidance memorandum provide for determining baseline emissions over a longer period if a source's emissions are irregular, cyclical, or otherwise vary significantly from year to year.

Rule 317 defines baseline emissions for most existing stationary sources in the South Coast Air Basin as an average of actual emissions from two years (fiscal years 2005-2006, and 2006-2007), not to exceed allowable emissions, and programmatically adjusted to account for regulatory effects between 2006 through 2010 for the South Coast Air Basin.

SCAQMD's staff report for Rule 317 explains that SCAQMD selected this two-year baseline period as more representative of typical production and emissions because it occurred before the economic recession that began in 2008 and that using 2010 attainment year actual emissions as the baseline year would lock sources to an atypical low production year. SCAQMD provided data on various indicators such as Gross Domestic Product, regional employment, and usage of fuels and coatings and solvents to show the recessionary effects on emissions throughout the area.

By letter dated December 21, 2011, SCAQMD provided source-specific emissions data and analyses that showed that all or almost all sources had emissions that varied from year to year. SCAQMD's letter states that the selection of fiscal years 2005-2006 and 2006-2007 as the baseline period for all major stationary sources results in an alternative baseline amount that is conservative but more representative of typical emissions. SCAQMD explains that under EPA's 2008 baseline guidance, sources are allowed to choose any recent historical 24-month consecutive period, including a period chosen by the source. See 40 CFR 52.21(48). SCAQMD's analyses show that the District's selected baseline period results in a lower baseline overall than would result from a regulatory approach that would allow sources to propose their own baseline. A lower baseline

amount is conservative because it establishes a lower threshold for calculating the assessment of section 185 fees. EPA agrees the emissions baseline provisions of Rule 317 are appropriate. EPA's TSD has more information on the alternative baseline.

Rule 317 requires SCAQMD to establish a "section 172(e) fee equivalency account" that will be credited with expenditures from qualified programs that meet the criteria outlined in section (c)(1)(A) of the rule. One criterion is whether the expenditures, which result in emission reductions, are surplus to the 1-hour ozone SIP. The approved 1-hour ozone SIP in the South Coast Air Basin is the 1997 Air Quality Management Plan, as revised in 1999.<sup>9</sup> The approved 1-hour ozone SIP in the Southeast Desert Modified AQMA is the 1994 Air Quality Management Plan.<sup>10</sup>

Surplus reductions are those that are not relied upon in the SIP, i.e., reductions that are not required nor assumed by the SIP to provide for RFP or attainment.<sup>11</sup> At the time of rule adoption, SCAQMD identified three preliminary lists of qualified programs - Rule 317 Attachment A, "List of Programs Pre-funding Section 172(e) Fee Equivalency Account," Attachment B in the

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<sup>9</sup> This SIP was approved by EPA on April 10, 2000 (see 65 FR 18903).

<sup>10</sup> This SIP was approved by EPA on January 8, 1997 (see 62 FR 1150).

<sup>11</sup> "Surplus" is discussed in EPA's guidance, *"Improving Air Quality with Economic Incentive Programs"* published on January 2001 (EPA-452/R-01-001) and available at <http://www.epa.gov/ttn/oarpg/t1/memoranda/eipfin.pdf>.

staff report, "List of Potential Section 172(e) Fee Equivalent Account Funding Programs for Post-2011," and Attachment C in the staff report, "List of Potential Future Section 172(e) Fee Equivalent Account (Credit) Programs."

By letter dated December 21, 2011, SCAQMD updated the lists of qualified programs, which are attached to the letter as Exhibit A "Qualified Programs and Estimated Actual Expenditures for 2010 and 2011 Pre-funding the Section 172(e) Fee Equivalency Account" and Exhibit B "Qualified Programs Providing On-Going Funding for Post-2010 to Section 172(e) Fee Equivalent Account."<sup>12</sup> The December 2011 letter also elaborates on the bases for the conclusion that listed programs are surplus and meet the criteria at Rule 317(c)(1)(A). EPA has reviewed this documentation and agrees with SCAQMD that the programs previously listed in Attachment A of Rule 317 and Attachments B and C of the staff report and listed as Exhibits A and B to the December 21, 2011 letter are surplus. This determination, with respect to these programs only, addresses section (c)(1)(A)(i) of the rule, which requires EPA's approval that the qualified

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<sup>12</sup> When SCAQMD adopted Rule 317, the programs listed in Attachment C were identified as "potential" programs for inclusion in the 172(e) equivalency account because SCAQMD did not have sufficient time to make a surplus determination. Subsequent to rule adoption, SCAQMD concluded in their letter dated December 21, 2011 that the programs listed in Attachment C of the staff report are also surplus. Exhibit B of SCAQMD's December 21, 2011 letter included all programs that were previously included in Attachments B and C of the February 2011 staff report.

programs are surplus to the SIP. Future determinations of "surplus" may be necessary if SCAQMD relies on programs or expenditures other than those identified in Exhibits A and B of the December 21, 2011 letter to offset section 185 fee obligations.

Rule 317 requires that expenditures from qualified programs result in direct reductions or facilitate future reductions of VOC or NO<sub>x</sub> emissions. In contrast, section 185 of the Act requires states to assess fees on stationary sources but does not require that the fees be used for activities beneficial in reducing ozone formation. We believe this requirement in Rule 317 to use the surplus funds for reducing ozone formation will result in further progress toward attainment.

SCAQMD is required to demonstrate equivalency for the previous year's fee obligation in accordance with section (c)(3) of the rule and report the results to CARB and EPA. Equivalency is demonstrated if the funds in the section 172(e) fee equivalency account are equal to or greater than the CAA non-attainment (section 185) fee obligation that would have been assessed for the prior year. The rule includes the correct equation to demonstrate equivalency.

If equivalency is demonstrated and there are "unused" expenditures that exceeded the amount of the fee obligations,

those "unused" funds are carried forward into the following assessment year. Since the expenditures have been determined to be surplus and there have been no other changes to the SIP for the 1-hour ozone standard, carrying these funds forward into the following year is acceptable because they would remain surplus. Also, if the expenditure occurred in a year prior to its use in an equivalency demonstration, the emission reductions would occur earlier, which is environmentally beneficial.

As an added measure to demonstrate equivalency, Rule 317 also has a forward-looking measure to estimate whether equivalency will likely be demonstrated. SCAQMD is required to preliminarily determine if expenditures in the section 172(e) fee equivalency account are at least 110% of the previous year's fee obligation, which serves as a surrogate for the current year's fee obligation. If the preliminary determination does not project equivalency in accordance with the rule, that would trigger the requirement for SCAQMD to adopt a backstop rule in advance of the actual equivalency demonstration. We believe this measure provides an additional checkpoint for ensuring equivalency.

If SCAQMD fails to either demonstrate equivalency or the preliminary determination of equivalency does not show expenditures in the account at least equal to 110% of the



estimated fee obligation, Rule 317 requires the EO to submit, within 90 days of the determination, a backstop measure to the Governing Board. Rule 317 also requires the Governing Board to act on the measure within 120 days of the determination, to either collect and/or track adequate fees to address the shortfall.

Rule 317 identifies certain elements to be included in a major stationary source backstop rule. If the backstop rule requires major stationary sources to pay fees, Rule 317 states that the backstop rule would allow sources to receive a credit for fees paid for operating fees and annual operating emissions fees. Title V regulations at 40 CFR 70 require the assessment of fees sufficient to cover Title V program costs. While any backstop rule would need to ensure that this fee credit provision would not adversely affect funds needed to cover Title V program costs, this issue ultimately needs to be addressed in the rulemaking process for the backstop rule.

Lastly, Rule 317 applies to SCAQMD and requires SCAQMD to follow the procedures to make the equivalency demonstration and to adopt a backstop rule to make up any shortfall if equivalency is not initially demonstrated. These provisions, if approved into the SIP, would be enforceable against SCAQMD.

In conclusion, Rule 317 requires SCAQMD to demonstrate on

an annual basis, in accordance with the principles of section 172(e), that its alternative CAA section 185 program is not less stringent than the program prescribed by CAA section 185. EPA therefore proposes to approve Rule 317 as satisfying the 1-hour ozone section 185 fee program requirements. The TSD has more information on our evaluation.

#### **VII. Proposed Action**

Because EPA believes SCAQMD Rule 317 fulfills all relevant requirements, we are proposing to approve Rule 317 as a SIP revision under section 110(k)(3) of the Act. EPA believes that SCAQMD's equivalent alternative program is not less stringent than the requirements set forth in section 185 of the Act; therefore we are proposing to approve SCAQMD's alternative program as fulfilling the requirements of sections 182, 185 and 172(e) of the Act. If finalized as proposed, this action would permanently terminate all CAA Section 110(c) Federal Implementation Plan (FIP) implications associated with our January 5, 2010 Finding of Failure to Submit a SIP revision to satisfy section 185 requirements for the SCAQMD (75 FR 232). We will accept comments from the public on these proposals for the next 30 days.

#### **VIII. Statutory and Executive Order Reviews**

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this proposed action merely proposes to approve State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this proposed action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);

- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- does not provide EPA with the discretionary authority to address disproportionate human health or environmental effects with practical, appropriate, and legally permissible methods under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed action does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control,  
Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting  
and recordkeeping requirements, Volatile organic compounds.

**AUTHORITY:** 42 U.S.C. 7401 *et seq.*

Dated: January 4, 2012.

Jared Blumenfeld,  
Regional Administrator,  
Region IX.

[FR Doc. 2012-447 Filed 01/11/2012 at 8:45 am; Publication Date:  
01/12/2012]